

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FRANK R. DeMILT	:	DETERMINATION
	:	DTA NO. 809935
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law and Chapter 17, Title 11 of the	:	
New York City Administrative Code for the Year	:	
1988.	:	

Petitioner, Frank R. DeMilt, 104 Hemlock Hill, Montague, New Jersey 07827, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and Chapter 17, Title 11, of the New York City Administrative Code for the year 1988.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on February 15, 1994 at 9:45 A.M., with all briefs to be submitted by June 13, 1994. Petitioner, appearing by Murphy & O'Connell, Esqs. (Patrick J. Murphy, Esq., of counsel), submitted a brief on April 18, 1994. The Division of Taxation, appearing by William F. Collins, Esq. (Vera R. Johnson, Esq., of counsel), submitted its brief on May 23, 1994. Petitioner submitted a reply brief on June 13, 1994.

ISSUES

I. Whether the Division of Taxation properly determined that petitioner was a "resident individual" and "city resident individual" pursuant to Tax Law § 605(b) and Administrative Code of the City of New York § 11-1705(b) during the year 1988, because he was domiciled in the City and State of New York during 1988 or whether he was a statutory resident of the City and State of New York during 1988.

II. Whether the negligence penalty imposed under Tax Law § 685(b) should be cancelled.

FINDINGS OF FACT

Petitioner, Frank R. DeMilt, timely filed a New York State Nonresident Income Tax Return (Form IT-203 with attachments) for 1988.¹ Petitioner's mailing address was listed as "c/o Schneider & Schecter P.C., 1250 Broadway, New York, New York." Form NYC-203, the New York City Nonresident Earnings Tax Return, attached to Form IT-203, set forth the allocation schedule for days spent in and out of New York City. With respect to petitioner's presence in New York in 1988, of 366 days² -- 242 were working days; 107 were days worked in New York City and on 135 days petitioner conducted business outside of the City. Form NYC-203 answered in the negative the question, "Did you or your spouse maintain an apartment or other living quarters in the City of New York during any part of the year?"

Attached to the 1988 IT-203 was a Form W-2, Wage and Tax Statement, issued to petitioner by F & F Graphics, Inc. Box 12 of this W-2 contained only petitioner's name, "Frank DeMilt", no address was listed for petitioner.

A field audit of petitioner's 1988 tax return was commenced by Rhona Abrams, an auditor with the Division of Taxation. During the audit,

Ms. Abrams reviewed documents supplied to her by petitioner's former representative, Howard Schneider. At the hearing, the auditor testified that she reviewed a 1988 diary, American Express receipts for 1988, and checks from January to July 1988. She also testified that she did a motor vehicle search, a "multi-search"³ and had an interview with petitioner's representative, Howard Schneider (tr., p. 113).

¹The original Form IT-203 with attachments was submitted during the hearing as the Division of Taxation's Exhibit "E".

²1988 was a leap year.

³According to Ms. Abrams, a "multi-search" lists what type of returns the taxpayer filed for previous years (tr., p. 113).

At the hearing, the auditor testified that the motor vehicle search which she had conducted revealed that in 1988 petitioner had a valid New York State driver's license, as well as a 1973 Oldsmobile registered in New York (tr., pp. 114, 151). She further testified that petitioner received mail at his New York City apartment which included "statements concerning a bank loan and commercial loan", as well as bank statements from Manufacturers Hanover (tr., p. 118).

During the audit, in response to questions raised by the auditor, petitioner's former representative, Howard Schneider, sent a letter⁴ in which he stated, in pertinent part, the following:

"I met with Frank DeMilt and obtained the following answers to the questions you raised:

"1) Mr. DeMilt lived in Florida before purchasing his New Jersey home in 1972.

"2) Mr. DeMilt first rented his New York City apartment in 1978.

"3) The F & F Graphics, Inc. salary was earned as a salesman for F & F Graphics, Inc. selling printed envelopes to accounts located in various States in the United States. Most of the customer contact is by telephone and mail since the envelope business is basically 'a re-order' business and merely requires mail or telephone confirmation to generate business. Since Mr. DeMilt is in Philadelphia, PA on the average of two days a week, he is contacting F & F Graphics, Inc. customers from his International Litho office in Philadelphia, from his homes in New Jersey and Florida and from his apartment in New York City.

"The allocation of wages from F & F Graphics, Inc. on the New York State income tax return for 1987 was based on estimated days out of New York State; which days were used to solicit F & F Graphics, Inc. customer business"

At the hearing, the auditor testified that she concluded that petitioner was a domiciliary of New York State based on the following factors:

(a) "The taxpayer was historically domiciled in New York through 1976. He then left to go to Virginia; however, he returned in 1978 and he rented an apartment on East 79th Street which he later purchased in 1985 for \$201,000" (tr., p. 114).

⁴A copy of this letter, dated May 17, 1990, addressed to "New York State Department of Taxation and Finance, New York State Office Bldg., Income Tax Section, Veterans Memorial Highway, Hauppauge, NY 11788, Attn: Rhona Abrams", was submitted as the Division of Taxation's Exhibit "F".

(b) "[T]he taxpayer has business connections in New York; he receives wages from F & F Graphics of which he is a 50 percent owner; he worked for International Litho which has a factory in Philadelphia but also has a showroom in New York; he spends a substantial amount of time in New York; he has a girlfriend from 1987 who, I was told, shared the apartment with him on 79th Street until they married" (tr., p. 115).

(c) "[H]is only checking account was with Manufacturers Hanover Trust, a New York bank; he had a car rented in New York; he had a driver's license that was valid in New York during that time" (tr., p. 116).

The auditor testified that she utilized the diary given to her by petitioner's former representative; however, she "couldn't tell by looking at the entries where the taxpayer was because there were many times the location was missing, and also many dates were left blank." She further testified that she examined American Express receipts in conjunction with the diary and "tried to fill in the gap as to the location of the taxpayer" (tr., p. 122). She testified that after utilizing the American Express receipts, she was able to "pinpoint the taxpayer as being in New York State 166 days; however, there were 71 blank days" (tr., p. 122). She further stated that she found the taxpayer to be in New York State three additional days after reviewing checks (tr., pp. 122-123). During the audit, the auditor prepared a 13-page summary based on the American Express receipts given to her for review. This document, entitled "Schedule of New York Days", was submitted by the Division of Taxation ("Division") as its Exhibit "I".

Based on a review of the diary, American Express receipts and cancelled checks, the auditor found petitioner to be in New York State for 169 days (tr., pp. 140-141).

The Division issued a Notice of Deficiency (Notice No. L-002539596-8) dated June 10, 1991 for personal income tax due pursuant to Article 22 of the Tax Law and the New York City Administrative Code for 1988. In that notice, petitioner was assessed (1) a deficiency for 1988 State income tax in the amount of \$38,519.69, plus \$6,136.14 in penalties and \$8,420.33 in interest; and (2) a deficiency for 1988 City income tax in the amount of \$16,719.24, plus \$2,663.35 in penalties and \$3,654.79 in interest. The total amount due was \$76,113.54.

The computation section of the notice contained the following explanation: "Field audit of your records disclosed additional tax due."

Petitioner timely filed a petition with the Division of Tax Appeals. Petitioner is seeking

a redetermination of the deficiency for personal income tax under Article 22 of the Tax Law and the New York City Administrative Code Chapter 17, Title 11 for 1988.

Petitioner asserts in his petition that the Commissioner: (1) "erroneously determined and applied Resident tax status to petitioner"; and (2) "erroneously adjusted petitioner's gross income, capital loss, Federal adjustments to income, earned income, unearned income, applicable tax rate and tax liability." Petitioner also asserted that he "is not a resident of New York for purposes of Article 22 and New York Tax Law."

On September 18, 1992, the Division answered the petition filed.

At the hearing, the Division's representative raised as an issue whether or not all of petitioner's wages for the tax year 1988 ought to be allocated to New York (tr., p. 6). Petitioner's representative contended that this was a newly-raised issue and should not be allowed because petitioner did not have notice (tr., pp. 8, 10-11).

The pleadings were amended.⁵

By letter dated February 22, 1994, the Division's representative withdrew the issue of the allocation of petitioner's wages for the period at issue.

Petitioner testified that prior to his 1964 separation from his former wife, he lived in Huntington, Long Island, New York (tr., p. 20). As a result of the divorce proceedings, his former wife received title to the Huntington, Long Island, New York property (tr., p. 20). Petitioner further testified that after his separation he resided at 124 East 30th Street in

New York City (tr., p. 19). Petitioner filed resident returns for New York State until 1976 (tr., pp. 20-21, 114).

⁵Petitioner was given the opportunity to have a continued hearing date because of the amendment of the pleadings (tr., p. 13). At the close of the hearing, petitioner was given until February 25, 1994 to decide whether or not a continued hearing date was necessary. The record was to remain open until March 25, 1994 for additional documentary evidence (tr., pp. 195, 205-206). By facsimile transmission dated February 26, 1994, petitioner's representative stated that petitioner wished to close the record and would "not offer any further opposition to the issue of allocation raised by respondent beyond that expressed at the hearing on Feb. 15th."

Petitioner testified that in October 1976 he "moved to Fairfax, Virginia" to take a fabulous job as a vice-president with Time-Life Books; however, "he could be off a month or two" (tr., p. 21). Sometime in 1979, petitioner left the employ of Time-Life Books (tr., p. 21).

Petitioner testified that he went to Florida in 1979 (tr., p. 22). At some point, petitioner purchased a house in Tamarac, Florida. Petitioner testified that he bought it "around '78, '79" for "about \$95,000". The Tamarac, Florida property was described as "a very large house, 3400 square feet, three bedroom, two and a half baths and swimming pool" (tr., p. 72).

In response to his representative's query about the activities in which he engaged in Florida in 1979, petitioner responded as follows:

"In 1979, I invested in a partnership, in an apartment building called -- maybe it was even a little before that, but I owned a number of apartments, three apartment buildings in 1979. And I might have sold one prior to that; I am not sure. That is going back a few years" (tr., p. 22).

Petitioner testified that he has not terminated his relationship with the Florida partnership; however, the partnership did sell one apartment building and purchase a shopping center (tr., pp. 22-23).

Petitioner testified that his stock brokerage account has been maintained "since 1979" with "Prudential Security on North Federal Highway in Fort Lauderdale, Florida" (tr., pp. 24-25).

Petitioner testified that, at the present time, his daughter resides in Coral Springs, Florida; his son resides in Waterhill, Florida; his mother is in Tamarac, Florida; and his sister is in Coral Springs, Florida (tr., p. 24).

At the hearing, petitioner testified that he was 60 years old (tr., p. 24). Petitioner is still working; however, he testified that he is "trying to wind down now." He further testified when and if he retires he will live in his home in Florida, where he is now (tr., p. 24).

Petitioner testified that, at the present time, he considers Florida his domicile and has since 1979. Prior to 1979 and after 1976, he regarded Virginia as his domicile (tr., p. 23).

In response to the question of how he came to use the apartment at 301 East 79th Street, New York, New York, he testified as follows:

A. "At one point, a gentleman, Ed Gambella, lived there -- and he was the president of Devon Litho⁶ and he lived there. And I would periodically use the apartment rather than come into town and spend two hundred dollars, you know, for a hotel room."

Q. "The frequency of your visits to New York suggested a more sensible or economical way of staying overnight?"

A. "Yes."

* * *

Q. "Did you have an arrangement with Mr. Gambella with respect to this apartment?"

A. "It was a corporate apartment leased by Devon Litho -- it wasn't owned; sorry -- and I would stay there and I would, you know, when I would go there, it was just like going to a hotel room; you would go out and buy your own food and that type thing" (tr., p. 33).

Petitioner testified he began sharing the apartment with Mr. Gambella in "1980, thereabouts" (tr., p. 34). He further testified that he and Mr. Gambella separated "pure guess, around '82" (tr., p. 34).

Petitioner continued to use the apartment after Mr. Gambella left. Concerning the status of the apartment after Mr. Gambella left, petitioner testified that "it changed to the effect that F & F Graphics used it periodically" (tr., p. 34).

Petitioner explained that F & F Graphics is a corporation of which he is a 50% owner.⁷ The other 50% is owned by Frank Caruso, who lives in Melville, New York (tr., pp. 34-35).

Petitioner stated that "business associates from Florida, partners of mine from Florida, clients from Connecticut" when they were coming into town used the apartment in addition to himself, Mr. Caruso and F & F Graphics (tr., p. 36).

Petitioner purchased the apartment in "1984, '85, in that period" when the building went

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Devon Litho is a printing company.

⁷F & F Graphics, Inc.'s address is 8 Windsor Place, Melville, New York 11747.

condo at an inside price (tr., pp. 35-36, 99). Petitioner described the apartment as "a one-bedroom, very tiny apartment" containing 617 square feet (tr., p. 69). Petitioner paid the utilities (tr., p. 99); however, he testified that F & F Graphics maintained the telephone line (tr., pp. 69, 176).

When asked about the ownership of the household furnishings, petitioner testified as follows:

A. "Actually it originally started, as I indicated, as a corporate apartment that Devon Litho owned and Devon Litho purchased the furnishings."

Q. "So when you purchased the apartment did you also purchase the furnishings?"

A. "No, I did not."

Q. "Who owns the furnishings at 301 East 79th Street?"

A. "I guess theoretically F & F because they use it, and I also -- the furnishings were left there when Mr. Gambella left to buy a house in Brooklyn, so he purchased the furnishings. Who owns them now? I guess, theoretically I guess I do, but I never purchased them" (tr., pp. 99-100).

Petitioner testified he did not keep anything personal in the apartment "because it was like a hotel room and other people used it" (tr., p. 69).

Petitioner testified that during 1988 in addition to himself, Frank Caruso, his Florida associates and clients utilized the 301 East 79th Street apartment (tr., p. 36).

In connection with petitioner's use of the apartment, the Division's representative asked him whether or not he had a girlfriend in 1988. Petitioner responded "I have a number of girlfriends. I visited with girls who were friends of mine" (tr., p. 106). He further testified that "periodically a woman would stay over" (tr., p. 106). Petitioner stated he believed he married in 1989 (tr., p. 107). He testified that the woman whom he married in 1989 was one of the girlfriends who would periodically stay over (tr., p. 107). His response to the question "How frequently did she stay over at the 309 East 79th Street apartment" was "when I was in town" (tr., p. 108).

In 1988, petitioner paid monthly garage fees to Continental Towers Garage. This garage

is located at 301 or 305 East 79th Street -- "it's in the building" (tr., p. 191).

During the audit period, petitioner maintained a checking account and a savings account in Manufacturers Hanover Bank (tr., p. 71).

Petitioner testified he moved from Tamarac, Florida in 1985 when he joined International Litho, which is located in Philadelphia, Pennsylvania. He stated that he "partially" resided in a corporate apartment located in Philadelphia (tr., pp. 25-26). He stated his principal residence became 104 Hemlock Hill, Montague, New Jersey, a house he owned (tr., p. 26). Petitioner described 104 Hemlock Hill, Montague, New Jersey as his main residence in 1988 (tr., pp. 16-17). The Montague, New Jersey house is a "two-bedroom duplex, both levels" containing 2,000 square feet of area, which in 1988 had a value of "about \$160,000" (tr., pp. 69-70).

In 1988, petitioner was executive vice-president and sales manager of International Litho. Petitioner explained that the company does "lithography; print advertising, promotional and collateral materials" in four-color, up to eight-color work. The company does "cosmetic and pharmaceutical print, which is high style" (tr., p. 27). Petitioner testified his corporate responsibilities included assisting clients with the press approval process at the Philadelphia plant; management duties which included "sort of" managing a number of salesmen who sold in the Philadelphia, South New Jersey and Boston areas; and travelling to Connecticut, New York, New Jersey, Massachusetts, Washington and California to make sales himself (tr., pp. 31-32). Petitioner estimated that 20% to 30% of his sales activity is conducted in New York City (tr., p. 32).

Petitioner submitted what he has characterized as a deposition of Barry Green which is, in effect, Mr. Green's affidavit, as his Exhibit "4"⁸ (tr., pp. 86-91). Mr. Green is founder and president of

⁸This deposition was taken at the offices of International Lithographing, 11631 Caroline Road, Philadelphia, Pennsylvania on January 31, 1994. The Division was not present at this deposition. Mr. Green was sworn and examined by petitioner's representative.

International Lithographing ("International Litho"). According to Mr. Green, the major shareholders of the company are himself, Mr. DeMilt and Mr. Amato. He states that he believed petitioner obtained his shares in either 1989 or 1990 -- he was not exactly sure. He also stated that petitioner does not own more than 5% of International Litho (see, Petitioner's Exhibit "4", pp. 15-16).

Mr. Green stated that, in addition to the plant located in Philadelphia, the company has an office in New York which both he and petitioner sometimes use. In 1988, the office "was basically an apartment that was converted to an office" and was located at 210 East 58th Street in New York City (Petitioner's Exhibit "4", p. 16). Mr. Green stated that he uses it as an apartment when he comes into town; however, petitioner does not use it as an apartment (Petitioner's Exhibit "4", p. 17).

In his deposition/affidavit, Mr. Green stated that he believed his business relationship with petitioner began in 1985, at which time petitioner was employed as a sales manager. Mr. Green stated that he knew that petitioner, prior to joining International Litho, had been employed by "Devon in New York" (Petitioner's Exhibit "4", pp. 7-8). Mr. Green also stated that petitioner currently is executive vice-president and sales manager and that he held that position in 1988 (Petitioner's Exhibit "4", p. 8).

Mr. Green stated that in 1988 International Litho had approximately 100 clients and employed "about eight salesmen" (Petitioner's Exhibit "4", pp. 11, 15). He also stated that he was familiar with the activities of all his salesmen including petitioner. According to Mr. Green, petitioner had ongoing relationships with the company clients. Petitioner's responsibilities were described as follows: (1) he was responsible for bringing the client to the Philadelphia plant and assisting the client through the press approvals necessary for the client's job. He spent "a considerable amount of time" involved with clients' press approvals at the Philadelphia plant; (2) he would also visit clients in Connecticut, New Jersey, Florida, Maine, Massachusetts and New York. When petitioner was not at the Philadelphia plant for a press approval, and was visiting clients, he was in daily telephone contact with Mr. Green

(Petitioner's Exhibit "4", pp. 12-13).

Based on the volume of business petitioner was doing in 1988, Mr. Green stated that petitioner could not have devoted more than 50% of his time to the New York State or New York City area and have performed his job satisfactorily. Mr. Green estimated, based on sales activities, that petitioner may have spent 30% of his time in New York (Petitioner's Exhibit "4", pp. 14-15).

At the hearing, petitioner submitted as his Exhibit "1" his 1988 diary⁹ which contained entries related to his business activities and was used to organize and plan his activities for weeks and months (tr., pp. 38-43). He testified that the entries for a particular day would be connoted "with names of individuals" (tr., p. 37). He further testified that he could determine where he was simply "by the names of the individuals" (tr., p. 38). He also stated that if a meeting was cancelled,

he generally drew a line through the name. He testified that days on which no entries appeared, so-called "blank" days, meant no business meetings were scheduled. Petitioner also testified that he entered the flight numbers and times in the diary on the specific date whenever he flew to Florida or other locations. Petitioner testified that he generally goes to Florida for eight to ten days at a time (tr., p. 181).

After reviewing his diary, petitioner prepared a one-page summary sheet entitled "Calendar Days in New York" which was submitted as petitioner's Exhibit "2" (tr., pp. 44-45). This exhibit contains the dates and total number of days which petitioner concedes he was in New York in 1988. According to Exhibit "2", petitioner concedes he was in New York 116

⁹The original desk diary was submitted at the hearing; however, petitioner did not have copies for the Division or himself (tr., pp. 43-44). Petitioner was given 10 days to submit a copy of the diary to both the Administrative Law Judge and the Division (tr., p. 205). The copy of the diary submitted to the Administrative Law Judge does not contain diary pages 22 and 23 -- diary dates February 22nd through 28th, 1988. The copy submitted contains faint and somewhat illegible entries.

days. Petitioner testified that his "[a]ppointments would sometimes be a lunch, perhaps sometimes a dinner" (tr., pp. 48-49). He testified that sometimes he did not spend the whole day in New York on sales activity and would go to either Philadelphia or his home (tr., p. 93). Petitioner testified that the International Litho plant was right outside of Trenton, New Jersey, 15 minutes from Amtrak. He stated that he could have a 10:00 A.M. appointment in New York, finish by 11:00 A.M. and hypothetically could be back at the plant at 1:30 P.M. (tr., p. 93).

During the hearing, petitioner was asked by his representative to use the 1988 desk diary to explain his whereabouts day by day for the first six months of 1988. However, petitioner did not testify as to his whereabouts for each day during the first six months. He did not state where he was on February 29th and has conceded that day as a New York day; the conceded New York day count is 117 (Petitioner's reply brief, p. 8). He failed to state where he was on February 23rd and guessed where he was on February 24th (tr., p. 52). He also failed to discuss his whereabouts on March 22nd and guessed his locations on April 20th and May 13th (tr., pp. 54, 56). He testified that on May 31st he had dinner in New York (tr., p. 57). He stated he was "apparently" at the plant on June 2nd; assumed he was at home on June 17, 18, 19 and 20; and did not state his whereabouts on June 28th (tr., pp. 58-59). None of these dates were reflected in his New York day count.

For the second half of the year, his representative asked him to identify only non-New York days (after July 4th) (tr., p. 60). However, petitioner gave testimony as to both New York days and non-New York days. Petitioner was unsure exactly where he was July 9, 10, 11 -- he vacillated between Commack, New York and New Jersey (tr., pp. 60-61). He was unsure of his whereabouts from July 14th through 25th (tr., pp. 61-62). Petitioner failed to testify as to his whereabouts on August 20th and testified that he did not know where he was on August 31st (tr., p. 63). He thought he was at a press approval in Philadelphia from September 9th through 12th; however, he was not sure from his review of the diary entries (tr., p. 64). Although the diary entries for September 15th through 27th were blank, petitioner guessed he was in Florida (tr., p. 64). None of the above dates were included in petitioner's New York day count.

Petitioner testified he was on vacation in West Hampton on October 8, 9 and 10; however, he did not include these days in his New York day count (tr., p. 65). Petitioner testified he had dinner in New York on November 9th; however, this date was not reflected in his New York day count (tr., p. 66).

Petitioner's 1988 Form 1040 with numerous attachments was submitted as petitioner's Exhibit "3". Petitioner's present home address on this tax return was listed as c/o Schneider & Schecter P.C., 1250 Broadway, New York, New York. Petitioner's Form 1040 Schedule C lists under "C Business name and address" Frank DeMilt, 174 Hemlock Hill, Montague, New Jersey 07827." Petitioner's occupation on the 1988 Form 1040 is listed as "outside salesman".

This exhibit also included copies of both the 1988 New York State Form IT-203 and the 1988 State of New Jersey - Resident Return, Form NJ-1040 1988. The address listed on both the New York State and New Jersey tax returns was also c/o Schneider & Schecter P.C. Form NJ-1040 1988 contains a section entitled "Part II Worksheet for completing residential property tax deduction, credit and tenant credit." According to the instructions for Part II, if a taxpayer is claiming credit for taxes paid to other jurisdictions, sections A and G must be filled out. The following information was requested in Section A:

"54. Address of principal residence (if different than indicated on page 1).

"55. If homeowner indicate LOT BLOCK MUNICIPALITY."

Section A was not filled out. Section G, the "Residential Property Tax Credit", lists \$65.00.

A copy of Form 2439, "Notice to Shareholder of Undistributed Long-Term Capital Gains" for the year 1988, issued by Gemini II Inc. Capital Shares c/o The Vanguard Group, Valley Forge, Pennsylvania 19482 to Frank DeMilt was also included in this exhibit. The address listed for petitioner on Form 2439 was 301 East 79th Street, New York, New York 10021.

Included in the attachments to Exhibit "3" was a 1988 Federal Income Tax Statement 2 - Income From Partnerships, which listed petitioner's three real estate partnership interests: (1) Creative Developers, Ltd.; (2) 1150-55 Assoc. Ltd.; and (3) Palm Springs Plaza Assoc. Passive

losses were shown for all three of these partnerships. Petitioner was not listed on Statement 2 as a general partner for any of these partnerships.

The Division's representative questioned petitioner about his participation in any other businesses besides F & F Graphics and International Litho. The testimony was as follows:

Q. "Did you materially participate with any other businesses?"

A. "Did I materially -- ?"

Q. "-- participate in any other businesses besides F & F Graphics and International Lithographers?"

A. "Yes."

MR. MURPHY: "May I say, you mean other than the ones he referred to earlier in his testimony?"

Q. "Other than the two that I specifically mentioned."

A. "Yes."

Q. "And what businesses were they and how did you personally participate in those businesses?"

A. "The word you're using is "participate", isn't it?"

Q. "Yes."

A. "I'm sorry. Well, I own apartment buildings in Florida; I own shopping centers in Florida; and I'm constantly looking for other avenues of real estate in the Florida market because that is where our concentration is."

Q. "So what percentage of your time would you devote to your personal participation in connection with ownership of the apartment buildings?"

A. "The amount of time that I've indicated I was in Florida in my diary of 1988 plus, obviously some phone calls from New Jersey to my partners. But the actual physical time spent in Florida is outlined in my diary and I believe documented by airline tickets as well as rental cars."

Q. "So for 1988, what percentage of your time would you have devoted to conducting these business activities?"

A. "I would have to go through my diary and count up the number of days during the course of a year that I've spent in Florida, and whatever percentage I've spent out of 365 days would be the answer to your question."

Q. "Did you conduct any business activities in New York State other than the activities with respect to F & F Graphics and International Lithographers?"

A. "In 1988?"

Q. "Yes."

A. "None that I can remember" (tr., pp. 97-98).

Petitioner testified that International Litho leased a Lincoln Continental for him, which was registered in New Jersey (tr., p. 105). He testified that he believed he had sent the 1973 Oldsmobile to Florida before 1988 (tr., p. 105).

Petitioner testified that International Litho did not supply him with a corporate credit card and that he had an expense account (tr., p. 98). He testified he retained receipts to document expenses submitted for reimbursement in connection with that expense account (tr., p. 98). He utilized his American Express card for business purposes, as well as for personal use. He testified that it was his practice to call numerous New York establishments from out of town, order goods to be shipped and charge it to his American Express card. He averred that he customarily sent gifts to clients, friends and family members which he ordered by telephone and charged to his American Express card. He stated that he placed most of his wine orders by telephone and that the wine was delivered (tr., pp. 176-177). He also testified that he had arrangements with a number of restaurants on 58th Street to charge his American Express card for clients' dinners when he was out of town and they were in Manhattan for a press approval (tr., pp. 177-178).

Petitioner testified he purchases his suits from Moe Ginsburg, a gentleman's discount place, that he goes "in on a Saturday", picks "out a few suits" and drives "back and there is a tailor that I used" (tr., p. 184).

During petitioner's review of the Division's Exhibit "I", "Schedule of New York Days", petitioner testified about a June entry on Exhibit "I" as follows:

"On June 11th, I went out to the Holiday Inn in Lake Ronkonkoma, New York. It was an, apparently, Friday night and I stayed out there over the weekend, because -- I remember that specifically because my best friend's daughter got married" (tr., p. 182).

Earlier petitioner had testified that it looked like he went to Atlantic City on June 9th and stayed there the 10th and 11th, and returned the 12th (tr., p. 58).

SUMMARY OF THE PARTIES' POSITIONS

Petitioner asserts he filed the proper return, a nonresident Form IT-203, for 1988 and that the Division's Notice of Deficiency should be cancelled. He contends that he abandoned his New York domicile in 1976 when he went to Virginia to assume a vice-presidency at Time-Life Books. He maintains that at that time he intended to make his home permanently in Virginia. However, Time-Life Books' management changed and petitioner left Time-Life Books sometime in 1979. He asserts that he moved to Florida in 1979, purchased a home and had investments there. Petitioner contends that he "has shown the requisite intent and actual change in residence to acquire a new domicile in Florida beginning in 1979" (Petitioner's brief, p. 8).

Petitioner maintains that he was in New York only 117 days in 1988 and therefore is not a statutory resident of New York (Petitioner's reply brief, p. 8). He avers that his business diary, in addition to his testimony, supports his New York day count. Moreover, petitioner asserts that his shared use of the 79th Street apartment did not make the apartment a permanent place of abode. He contends that he considered the apartment like a hotel room which he used for business purposes only. He argues that "a hotel room, or sleeping accommodation transiently used for business purposes, does not constitute a dwelling place contemplated by the statute and regulation" (Petitioner's brief, p. 13). He maintains his mere ownership and use of the apartment in lieu of a hotel room does not make the 79th Street apartment "a dwelling place maintained by the taxpayer."

Lastly, he asserts that he did not willfully or intentionally disregard the relevant provisions of the Tax Law and the regulations. He maintains that his nonresident Form IT-203 was made out and prepared by a certified public accountant with knowledge of the facts and with all of petitioner's records. Petitioner also contends the burden is on the Division to prove that the negligence penalty is warranted.

The Division contends that petitioner was a domiciliary of the State of New York during 1988. It asserts that the burden of proof is upon petitioner to produce probative evidence of a change in domicile, i.e., physical presence and intent. The Division maintains that "the hearing

record contains insufficient evidence to support a legal conclusion that the petitioner effectuated [sic] a change in domicile" (Division's brief, p. 21). The Division further asserts that:

"[t]he general statements made by the petitioner and his repeated, speculative assertions make an analysis of his general habits impossible. These assertions and general statements are outweighed by the audit findings" (Division's brief, p. 22).

The Division contends that petitioner was a statutory resident of New York in 1988. Citing relevant case law, it asserts that petitioner maintained a permanent place of abode in New York State during 1988. It also asserts that petitioner has failed to establish that he spent 183 days or less in New York during 1988. It contends that the hearing record contains insufficient evidence to establish that petitioner spent 183 days or less during the year at issue.

The Division contends that:

"the diary and summary thereof submitted into the hearing record are inadequate as petitioner has failed to provide an independent means for interpreting and verifying the accuracy of the entries contained in the diary" (Division's brief, p. 26).

The Division argues that petitioner's diary is meaningless. It maintains that "the diary contains very few entries which include a notation as to the location of the petitioner" (Division's brief, p. 27).

Lastly, the Division asserts that the negligence penalty was properly imposed. It further contends that petitioner has failed to establish that the deficiency at issue was not due to negligence.

CONCLUSIONS OF LAW

A. Tax Law § 605(b) provides, in pertinent part, as follows:

"Resident individual. A resident individual means an individual:

"(A) who is domiciled in this state, unless (i) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or

"(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state"

B. Section 11-1705(b)(1) of the Administrative Code of the City of New York provides a virtually identical definition of a New York City resident individual for purposes of the City

income tax.

C. Permanent place of abode is defined in the regulations at 20 NYCRR former 102.2(e)(1) as:

"a dwelling place permanently maintained by the taxpayer, whether or not owned by him, and will generally include a dwelling place owned or leased by his or her spouse."

D. The Tax Law does not contain a definition of "domicile", but the Division's regulations (20 NYCRR former 102.2[d]) provided, in pertinent part, as follows:

"(d) Domicile. (1) Domicile, in general, is the place which an individual intends to be his permanent home -- the place to which he intends to return whenever he may be absent. (2) A domicile once established continues until the person in question moves to a new location with the bona fide intention of making his fixed and permanent home there. No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of his former home. The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, his declarations will be given due weight, but they will not be conclusive if they are contradicted by his conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that he did this merely to escape taxation in some other place.

* * *

"(4) A person can have only one domicile. If he has two or more homes, his domicile is the one which he regards and uses as his permanent home. In determining his intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. As pointed out in subdivision (a) of this section, a person who maintains a permanent place of abode in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though he may be domiciled elsewhere."

E. To effect a change in domicile, there must be an actual change in residence, coupled with an intent to abandon the former domicile and to acquire another (Aetna National Bank v. Kramer, 142 App Div 444, 445, 126 NYS 970). Both the requisite intent as well as the actual residence at the new location must be present (Matter of Minsky v. Tully, 78 AD2d 955, 433 NYS2d 276). The concept of intent was addressed by the Court of Appeals in Matter of Newcomb (192 NY 238, 250-251):

"Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.

"The existing domicile, whether of origin or selection, continues until a new one is acquired, and the burden of proof rests upon the party who alleges a change. The question is one of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals In order to acquire a new domicile there must be a union of residence and intention. Residence without intention, or intention without residence, is of no avail. Mere change of residence although continued for a long time does not effect a change of domicile, while a change of residence even for a short time, with the intention in good faith to change the domicile, has that effect Residence is necessary, for there can be no domicile without it, and important as evidence, for it bears strongly upon intention but not controlling, for unless combined with intention, it cannot effect a change of domicile There must be a present, definite, and honest purpose to give up the old and take up the new place as the domicile of the person whose status is under consideration [E]very human being may select and make his own domicile, but the selection must be followed by proper action. Motives are immaterial, except as they indicate intention. A change of domicile may be made through caprice, whim, or fancy, for business, health, or pleasure, to secure a change of climate, or change of laws, or for any reason whatever, provided there is an absolute and fixed intention to abandon one and acquire another, and the acts of the person affected confirm the intention No pretense or deception can be practiced, for the intention must be honest, the action genuine, and the evidence to establish both clear and convincing. The animus manendi must be actual with no animus revertendi

"This discussion shows what an important and essential bearing intention has upon domicile. It is always a distinct and material fact to be established. Intention may be proved by acts and by declarations connected with acts, but it is not thus limited when it relates to mental attitude or to a subject governed by choice."

F. The test of intent with respect to a purported new domicile has been stated as "whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it" (Matter of Bourne, 181 Misc 238, 246, 41 NYS2d 336, 343, affd 293 NY 785; see, Matter of Bodfish v. Gallman, 50 AD2d 457, 378 NYS2d 138, 140). Moves to other states in which permanent residences are established do not necessarily provide clear and convincing evidence of an intent to change one's domicile (Matter of Zinn v. Tully, 54 NY2d 713, 442 NYS2d 990). The Court of Appeals articulated the importance of establishing intent, when, in Matter of Newcomb (supra) it stated, "No pretense or deception can be practiced, for the intention must be honest, the action genuine and the evidence to establish both clear and convincing." Additionally, formal declarations of domicile or principal residence are generally less persuasive in establishing intent than one's "general habit of life" (see, Matter of Trowbridge's Estate, 266 NY 283).

G. A review of the record compels the conclusion that petitioner has failed to sustain his

burden of proving by clear and convincing evidence that he intended to change his domicile from New York (State and City) to either Virginia or Florida (see, Matter of Bodfish v Gallman, supra).

Petitioner was historically domiciled in New York until 1976. He asserts that he left New York in 1976, never intending to return, and moved to Fairfax, Virginia where he assumed a vice-presidency with Time-Life Books. He contends that he moved to Florida at some point in 1979 when he left the employ of Time-Life Books due to a management change. He contends that his purchase of a Florida home and investment in Florida partnerships manifest his intent to establish Florida as his domicile in 1979. The record indicates that petitioner retained significant ties to New York which continued through the 1988 audit period. Petitioner testified that because he made frequent trips to New York City, he began sharing an apartment located at 301 East 79th Street in 1980 with Mr. Gambella, the president of Devon Litho; however, the record contains evidence that he may have begun renting the apartment as early as 1978 (see, Findings of Fact "3" and "20"). It appears from the record that prior to 1985 petitioner was employed by Devon Litho (see, Finding of Fact "28"). Petitioner was employed by F & F Graphics, Inc., a New York corporation, of which he was a 50% owner. It is unclear from the record when F & F Graphics was incorporated; however, petitioner testified that F & F Graphics began using the East 79th Street apartment in 1982 when Mr. Gambella left. Petitioner continued to be employed by F & F Graphics during 1988. Petitioner's employment in 1985 by International Litho as a sales manager did not diminish his New York ties. International Litho maintained an apartment/office in New York City which petitioner could and did use on occasion (see, Finding of Fact "28"). Many of International Litho's clients were located in New York, and petitioner met with them regularly. In 1988, petitioner was executive vice-president and sales manager of International Litho. He continued to visit New York clients during this period. "Active" business ties have been considered an indication of a failure to abandon a New York domicile (see, Matter of Kartiganer, Tax Appeals Tribunal, October 17, 1991, confirmed 194 AD2d 879, 599 NYS2d 312).

Petitioner continued to rent the East 79th Street apartment after Mr. Gambella left. He purchased the apartment sometime in 1984 or 1985 at an insider price. He owned the apartment during 1988. He also rented a parking space in a garage located next to the East 79th Street apartment (see, Finding of Fact "24"). He testified that he paid the utilities; however, F & F Graphics maintained the telephone line for the apartment (see, Finding of Fact "22"). Petitioner received mail at the New York apartment (see, Findings of Fact "2" and "32").

Petitioner's retention of title to real property in New York City (Matter of Chrisman, 43 AD2d 771, 350 NYS2d 468; Matter of Roth, Tax Appeals Tribunal, March 2, 1989), continued maintenance of a New York City apartment (Matter of Cooper v. State Tax Commn., 82 AD2d 950, 441 NYS2d 30), and considerable time spent in New York City working for F & F Graphics, Inc. and International Litho during the year at issue (Matter of Clute v. Chu, 106 AD2d 841, 484 NYS2d 239; Matter of Simon, Tax Appeals Tribunal, March 2, 1989) are other factors adverse to petitioner's attempt to establish himself as a Florida domiciliary.

It is also significant that there is a lack of evidence in the record regarding petitioner's "general habit of life" prior to 1988. The record is virtually silent as to petitioner's pattern of living prior to the year at issue. It is clear from the record that, for the year in question, petitioner spent significantly more time in New York than he spent in Florida. The record also indicates that petitioner's move to Virginia was only a temporary absence.

Finally, it is noted that there are numerous other factors which tend to show that petitioner did not change his domicile from New York. These factors include: petitioner's New York driver's license; New York registration of his antique automobile; petitioner's checking and savings accounts in a New York bank; petitioner's use of New York professionals; and petitioner's use of his New York address on bank statements for investment purposes.

It is impossible to find a change of domicile based on the record before me. Petitioner has failed to carry his burden of proving by clear and convincing evidence that he intended to change his domicile from New York (State and City) to Florida.

H. Although I have concluded that petitioner has failed to sustain his burden of proving a

change of domicile, I will next address the issue of "statutory residency". Even if it is determined that petitioner changed his domicile from New York to Florida, he would be properly assessed herein if he both maintained a permanent place of abode in New York (State and City) and spent in the aggregate more than 183 days there during the audit period (Tax Law § 605[b][1][B]).

Petitioner argues that his shared use of the 79th Street apartment did not make the apartment a permanent place of abode. He contends that the apartment was similar to a "hotel room" and his use was for business purposes only. He asserts that he kept no personal belongings there. Furthermore, he asserts that "a hotel room, or sleeping accommodation transiently used for business purposes, does not constitute a dwelling place contemplated by the statute and regulation."

The definition of a permanent place of abode is contained in Conclusion of Law "C". There is no requirement that petitioner actually dwell in the abode, but simply that he maintain it (see, Matter of Smith v. State Tax Commn., 68 AD2d 993, 994, 414 NYS2d 803; Matter of Evans, Tax Appeals Tribunal, June 18, 1992, confirmed 199 AD2d 840, 606 NYS2d 404). Petitioner owned the East 79th Street apartment; paid the utilities; had unrestricted access to the dwelling place; and maintained it. Petitioner clearly maintained a permanent place of abode in New York (State and City) within the meaning and intent of Tax Law § 605(b) and 20 NYCRR former 102.2(e)(1).

The remaining issue is whether petitioner spent in the aggregate more than 183 days of the taxable year in New York (State and City). Petitioner has the burden of proving by clear and convincing evidence that he did not spend more than 183 days in New York (State and City) during the year in issue (Matter of Smith v. State Tax Commn., supra; Matter of Kornblum v. Tax Appeals Tribunal, 194 AD2d 882, 599 NYS2d 158; see also, 20 NYCRR former 102.2[c]). I find that petitioner has failed to sustain his burden.

Petitioner was under the obligation to maintain "adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within New York State"

(20 NYCRR former 102.2[c]). The Tax Appeals Tribunal in Matter of Moss (November 2, 1992) found that a diary, which was supported by detailed and consistent testimony and travel reports, complied with the requirement set forth in 20 NYCRR former 102.2(c). Petitioner submitted his business diary into the record. The record also contains a New York day count summary sheet which he prepared based upon his review of the business diary. Petitioner did not submit any travel or expense reports into the record.

In the instant case, the business diary submitted into the record contains illegible entries, as well as entries which consist solely of a name without any reference to a location. There are also entries for trips which referenced only a flight number and departure and arrival times, not the airline. Pages 22 and 23 of the business diary (entries for February 22nd through 28th) are missing from the copy of the diary submitted into the record. There were numerous blank dates in the diary (see, Finding of Fact "29").

Petitioner testified concerning the diary and the entries. I find petitioner's testimony to be vague, evasive and less than credible. The record reveals that petitioner himself found it difficult to interpret the entries for certain dates and at times made assumptions as to his whereabouts. Petitioner's testimony concerning his whereabouts on certain dates also conflicts with the diary entries for those dates. Petitioner also failed to testify as to his whereabouts on certain dates. Petitioner focused his New York day count solely on his business activities. It appears from his testimony that he may have been present in New York for personal reasons (i.e., dinners, vacations, etc.) which were not reflected in his New York day count (see, Findings of Fact "31" and "35"). Absent from the record are any corroborating travel or expense reports which would support petitioner's diary entries or his testimony.

Based on the record before me, I am unable to determine how many days petitioner spent in New York (State and City) during the year in issue. Petitioner has failed to meet his burden of proof on this issue (Tax Law § 689[e]).

I. Petitioner contends that since he did not negligently or intentionally disregard the provisions of Tax Law § 605 or 20 NYCRR former 102.2(e)(1), the negligence penalty assessed

pursuant to Tax Law § 685(b) should be waived. Petitioner argues that he had solid grounds for filing Form IT-203. He asserts that he "had changed his domicile ten years before filing his 1988 tax year in April 1989" and also was not present in New York 183 days. He also maintains that his IT-203 was prepared by a certified public accountant who had "knowledge of the facts and with all petitioner's records." Lastly, petitioner contends that the Division bears the burden of proof on this issue.

The Division contends that petitioner's failure to declare on his 1988 tax return that he maintained a permanent place of abode in New York is due to nothing other than pure negligence.

Petitioner bears the burden of proving that the deficiency was not due to negligence (Tax Law §§ 685[b]; 689[e]). Petitioner has not sustained his burden of proof. The East 79th Street apartment is a permanent place of abode within the meaning of 20 NYCRR former 102.2(e)(1). Petitioner has failed to explain why he did not reveal his maintenance of the East 79th Street apartment on his 1988 tax return when he had owned and maintained the apartment prior to 1988.

The Division properly assessed the negligence penalty.

J. The petition of Frank R. DeMilt is denied and the Notice of Deficiency (L-002539596-8) dated June 10, 1991 is sustained.

DATED: Troy, New York
December 12, 1994

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE